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**ASSOCIATION OF
AMERICAN RAILROADS**

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FEB 27 2012

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Public Record

February 27, 2012

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: STB Docket No. FD 35517, *CF Industries, Inc. v. Indiana & Ohio Railway, Point Comfort and Northern Railway, and the Michigan Shore Railroad*—Petition for Declaratory Order

Dear Ms. Brown:

Pursuant to the Board's order served September 30, 2011, attached please find the Reply Comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
*Counsel for the Association of
American Railroads*

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35517

CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT AND
NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—PETITION FOR
DECLARATORY ORDER

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In a decision served September 30, 2011, the Surface Transportation Board (“Board”) instituted a declaratory order proceeding to resolve a controversy regarding the reasonableness of practices established by RailAmerica, Inc. (“RailAmerica”) and several of its railroad subsidiaries (collectively, “RailAmerica railroads”) related to the transportation of Toxic-by-Inhalation Hazardous materials and Poison-by-Inhalation Hazardous materials (“TIH/PIH”). The proceeding was initiated in response to a petition by CF Industries, Inc. (“CF Industries”), requesting that the Board declare certain aspects of the RailAmerica railroads’ tariffs and TIH/PIH Standard Operating Practice Implementation Proposal (“SOP”) constitute unreasonable practices under 49 U.S.C. § 10702.

As noted in the September 30, 2011 decision, this proceeding is related to another pending proceeding. On April 15, 2011, American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (collectively, “complainants”)¹ filed a

¹ On June 13, 2011, Arkema Inc. filed a petition to intervene on behalf of the complainants and seeking the same relief.

complaint in Docket No. NOR 42129 against Alabama Gulf Coast Railway and RailAmerica challenging essentially the same tariffs and SOP. The Board concluded that this declaratory order proceeding would allow it to address the legal issues raised in both cases in one proceeding and to allow for broader public input.

Opening comments were filed by RailAmerica, CF Industries, Dow Chemical Company (“Dow”), and the complainants in Docket No. NOR 42129.

The Association of American Railroads (“AAR”) has a strong interest in the safe transportation of TIH/PIH materials by rail and in the application of sound legal principles and public policy considerations when the Board addresses the reasonableness of practices related to TIH/PIH rail transportation. Accordingly, the AAR offers these reply comments directed at legal and policy issues raised in the parties' opening comments in this proceeding. The AAR takes no position on and will not address commercial interests or the specific terms of any of the railroad tariffs or SOP at issue.

Discussion

The AAR submits that, as a general legal principle, the common carrier obligation and federal safety regulations do not preclude, and it would not be an unreasonable practice for, the establishment by rail carriers of safety practices that exceed a federally mandated minimum level. Moreover, *Consolidated Rail Corp. v. I.C.C.*, 646 F.2d 642 (D.C. Cir. 1981) (“*Conrail*”) does not hold that such safety practices exceeding federal mandated levels are necessarily unreasonable practices. Finally, the burden of proof properly falls on the party seeking relief from the Board.

I. The Common Carrier Obligation And Federal Safety Regulations Do Not Preclude Rail Carriers From Establishing Safety Practices That Exceed A Federally Mandated Minimum Level.

The common carrier obligation derives from 49 USC § 11101(a), which requires that a carrier provide “transportation or service upon reasonable request.” To carry out their obligation, rail carriers must “establish reasonable...rules and practices” pursuant to 49 U.S.C. § 10702.

Neither “service upon reasonable request” nor “reasonable practice” is statutorily defined. The definition and scope of these terms are to be determined by the Board on a case-by-case basis in light of all the relevant facts and circumstances. *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) (“*Granite*”); *see also National Grain & Feed Ass’n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993); *Decatur County Comm’rs v. STB*, 308 F.3d 710, 716 (7th Cir. 2002). The Board has discretion to establish the factors it will consider in relation to the reasonableness of a railroad practice. *N. Am. Freight Car Ass’n v. BNSF Ry. Co.*, STB Docket No. NOR 40260 (Sub-No. 1)(served January 26, 2007), *pet. for review denied sub nom N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008)(“*NAFCA*”); *Granite*; *see also Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Docket No. FD 35305 (served March 3, 2011) (“*Coal Dust*”). These factors include consideration of safety issues. *See, e.g., Akron, C. & Y. Ry. v. ICC*, 611 F.2d 1162, 1170 (6th Cir. 1979)

A. Federal Safety Rules Are A Floor, Not A Ceiling.

Railroads are subject to and must comply with a myriad of Federal Railroad Administration (“FRA”), Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and Transportation Safety Administration (“TSA”) rules for movements of TIH/PIH

commodities. Those regimes act as a regulatory safety floor under which rail carriers' practices may not fall. But they do not serve as a ceiling proscribing other safety measures railroads may establish. The federal agencies involved in railroad and hazardous materials safety have acknowledged as much. In establishing rules for tank cars involved in TIH/PIH transportation, FRA and PHMSA have expressly stated that "... parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations." Docket No. FRA-2006-25169, *Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials; Final Rule*, 74 FR 1793 (January 13, 2009).

Moreover, the relevant agencies have also expressed to the Board in the past that railroads should be encouraged to exceed government safety mandates. In its comments in *Union Pacific R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35219, TSA stated:

Petitioner is free to and encouraged to adopt additional measures. For example TSA's guidance to freight railroad carriers, issued in conjunction with DOT in November 2006, encourages carriers to put in place 27 security measures, including measures to decrease the time PIH materials spend in high threat urban areas (HTUAs) and improve the security of the rail cars and reduce the vulnerability of the public while these cars are in HTUAs.

TSA Comments in *Union Pacific R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35219 (filed April 10, 2009) at 5. In that same proceeding, the U.S. Department of Transportation outlined the responsibilities of FRA, PHMSA and TSA in establishing various rules governing the safe transportation of hazardous materials via rail. Those comments also detailed efforts the Department was undertaking to facilitate additional, voluntary actions by rail carriers to enhance safety. See DOT comments in *Union Pacific Railroad Company – Petition for Declaratory Order*, STB Docket No. FD 35219 at 12

(filed April 10, 2009). In other words, while federal safety regulations establish the railroads' legal obligations, they do not preclude railroads from employing enhanced safety practices as they see fit any more than other mandated government requirements should preclude any other responsible company, including chemical companies, from such a course of action.

Moreover, in considering the reasonableness of any particular railroad practice, the Board should consider whether its actions would hinder innovation and improved safety for the public. It would not promote public policy for the Board to conclude that a railroad should, in all instances, only adhere to the requirements of federal regulations and not employ enhanced safety measures where the railroad deems appropriate.

B. *Conrail* Does Not Dictate To The Board Either The Factors To Consider Or The Outcome Of Challenges To The Reasonableness Of Railroad Practices.

The shipper interests participating in this proceeding also argue that the Board is constrained by *Conrail* to consider only a cost-benefit analysis in evaluation of railroad safety practices. *See, e.g.,* Dow Opening at 10; Complainants Opening Statement at 6. Dow suggests that the Board should evaluate railroad safety practices to see if they produce benefits which are commensurate with their cost and consider whether they represent an "economical means of achieving the expected safety benefit when compared with other possible safety measures." Dow Opening Statement at 10-11, citing *Conrail*, 646 F.2d at 648.

The Board has previously rejected arguments that *Conrail* dictates the analysis that the Board must perform when evaluating the reasonableness of railroad practices. *NAFCA*, at 8; *Coal Dust*, at 5. As noted above, the Board must evaluate all relevant facts and circumstances when conducting its case-by-case evaluation. Indeed, "Congress did not limit the Board to a

single test or standard for determining whether a rule or practice is reasonable.” *NAFCA*, at 8. “This broad discretion is necessary to permit the Board to tailor its analysis to the evidence proffered and arguments asserted under a particular set of facts.” *Id.* This remains true in this proceeding and in all cases where the Board considers the reasonableness of railroad safety practices.

Moreover, the issues related to TIH/PIH transportation are distinguishable from those associated with nuclear materials transportation considered in the *Conrail* litigation. The litigation in *Conrail* was one of several pre-Staggers Act² cases before the ICC addressing the carriage of nuclear materials in the 1960s and 1970s.³ The ICC held, *inter alia*, that it had jurisdiction to consider the railroads’ safety arguments attempting to justify the rail tariffs at issue without infringing upon the jurisdiction of the Nuclear Regulatory Commission and the Department of Transportation. *Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 ICC 756, 759(1980). After reviewing the safety evidence before it, the Commission determined that the tariffs constituted an unreasonable practice. *Id.* at 773.

But there are clear differences between TIH/PIH transportation and nuclear materials transportation which have been recognized by the ICC as relevant to a reasonable practices analysis. In another case, *Classification Ratings of Chemicals, Conrail*, 3 ICC 2d 331 (1986), the ICC described as a factual matter different transportation characteristics between nuclear materials and hazardous chemicals; cited differences between the safety regulatory regimes; and noted the absence of any limitation on liability for the release of hazardous chemicals in the mold

² Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

³ The railroads did transport such material, however, under specific contractual arrangements with individual shippers.

of the Price Anderson Act⁴ cap for spent nuclear fuel. *Id.* at 336. Although the ICC ultimately denied Conrail's attempt to "flag out" of its common carrier obligation to transport TIH/PIH materials, the ICC did so because of the lack of meaningful evidence on why Conrail could not accomplish what it sought to do in a published tariff. The ICC also noted that "[T]he Commission has discretion to determine if there may be limitations on a carrier's tariff publication/common carrier obligation [regarding transport of ultra-hazardous materials].... This determination will include an analysis of ... financial evidence including insurance costs and the extent of carrier liability." *Id.* Thus, the ICC recognized the unique facts and circumstances presented by TIH/PIH materials and considered factors beyond those enunciated in *Conrail* in judging the reasonableness of railroad practices.

II. The Burden of Proof Properly Falls on the Party Seeking Relief from the Board.

The Board has consistently ruled that under the current statutory framework, the burden of proof in proceedings challenging the reasonableness of a rail carrier's practices rests with the party bringing the challenge and seeking relief or other action from the Board.

Parties may challenge the reasonableness of railroad rules and practices under 49 U.S.C. § 10702 in two ways. They may file a complaint with the Board under 49 U.S.C. § 11701(b) or they may ask the Board to issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction under 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

The Administrative Procedure Act places the burden of proof on the petitioner seeking a declaratory order from an administrative agency. *See* 5 U.S.C. § 556(d). The Board routinely

⁴ Atomic Energy Damages Act, Pub. L. No. 85-256, 71 Stat. 576 (1957).

applies this standard in its declaratory proceedings. *See, e.g., Union Pacific R.R. Co. – Petition for Declaratory Order*, STB Docket No. FD 35504 (served December 12, 2011) and this application has been upheld on appeal. *See City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005). Similarly, complainants bear the burden proof in a complaint proceeding before the Board. *See, e.g., North America Freight Car Association v. BNSF Railway Company*, STB Docket No. NOR 40260 (Sub-No. 1)(served January 26, 2007), *pet. for review denied sub nom North America Freight Car Ass’n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008)(“NAFCA”). Contrary to the assertions made in the shipper interests’ opening statements, nothing in this proceeding or prior precedent indicate that the Board should apply a different burden of proof standard in this case or other cases related to railroads’ safety practices.

The shippers point to the *Conrail* decision to argue a different the burden of proof.⁵ However, as explained below, both the governing law on the burden of proof and the procedural posture of the parties in the present proceedings differ from the circumstances in *Conrail*. As a result, reliance on *Conrail* here is misplaced and irrelevant.

In *Conrail*, the court stated, “the burden is upon [the carrier] to show that, for some reason, the presumptively valid ... [safety] regulations are unsatisfactory or inadequate in their particular circumstance.” *Conrail*, 646 F.2d at 650. From this, the shippers conclude that the railroads must sustain a burden of proof in proceedings challenging the reasonableness of their safety practices. But the Court’s language in *Conrail* placing an evidentiary burden on the railroads in that case was in the context of that particular case and under a completely different statutory framework prior to the enactment of the Staggers Act and the ICC Termination Act of

⁵ *See* Dow Opening Statement at 8; CF Industries Opening Statement at 5; Complainants Opening Statement at 9.

1995.⁶ “[T]he Conrail decision was premised on facts not present here and on a statutory scheme predating the Staggers Act.” *NAFCA*, STB Docket No. NOR 42060 (Sub-No. 1) (served January 27, 2007).

In that litigation, shippers objected to railroad tariffs filed with the ICC. The ICC then suspended the operation of the tariffs and instituted an investigation proceeding.⁷ By statute then in effect, the railroads had the burden of proof in such an investigation proceeding. *See* former 49 U.S.C. § 10707(e) (1980).⁸ Thus, the *Conrail* court was judging an appeal brought by the railroads of an order by the ICC in a proceeding that properly applied a statutory burden of proof on those railroads. It is in that context, that the court opined that the railroads had failed to meet their evidentiary burden of proof. Moreover, as an appellant before the Court of Appeals, the railroads also had a burden of proof to sustain their appeal.

Under current law, railroads do not carry a burden of proof before the Board to establish the reasonableness of each and every safety related rule or practice that exceed federally mandated minimum levels and, shippers’ efforts to shoehorn this proceeding and other modern safety practice cases within the *Conrail* decision do not alter the statutory burden of proof in effect today.⁹ Thus, for the reasons stated above, the Board should employ its customary, and

⁶ Pub. L. No. 104-88, 109 Stat. 803 (1996) (“ICCTA”).

⁷ On March 15, 1979, the ICC reversed itself and vacated the suspension of the tariffs. The tariffs then went into effect and remained so until the conclusion of the litigation.

⁸ Section 207 of the Staggers Act removed subsection 10707(e).

⁹ Also, contrary to Dow’s assertion, post-ICCTA precedent does not support Dow’s argument for a different burden of proof. Dow cites footnote 7 of the *NAFCA* appellate decision, and the accompanying discussion of *Conrail* as support for its position. But footnote 7 of that decision merely contrasts the findings of the court in *Conrail* regarding the safety regulations related to nuclear materials in *Conrail* to the storage charge issues in *NAFCA*. The court explicitly notes that the petitioner in *NAFCA* bore the burden of proof as the complainant in their unreasonable practice complaint before the Board. *NAFCA*, 529 F.3d at 1174.

judicially approved, burden of proof standard that a party seeking relief from the Board, i.e., a complainant or a petitioner in a declaratory order proceeding, bears the burden of proof, in considering any challenge to the reasonableness of a railroad practice.

Conclusion

Based on the foregoing, as a matter of general legal principles and precedent, it is not a violation of the common carrier obligation or an unreasonable practice for a rail carrier to impose safety related operating requirements, if it chooses to do so, for the transport of TIH/PIH materials beyond those mandated by federal regulation. Moreover, the burden of proof in the context of a challenge to a rail carrier's safety operating requirement for TIH/PIH transport lies with the party challenging the requirement.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Rosita M. N'Dikwe, hereby certify that on this date I served by first-class mail, postage prepaid a copy of the Reply Comments of the Association of American Railroad in Finance Docket No. 35517, *CF Industries, Inc. v. Indiana & Ohio Railway, Point Comfort and Northern Railway, and the Michigan Shore Railroad – Petition for Declaratory Order* on all parties of record.


Rosita M. N'Dikwe

Dated: February 27, 2012